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on

REAUTHORIZATION OF THE SATELLITE TELEVISION EXTENSION AND LOCALISM ACT

before the

Subcommittee on Communications and Technology

Committee on Energy and Commerce

UNITED STATES HOUSE OF REPRESENTATIVES

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Good morning, Mr. Chairman and Members of the Subcommittee. My name is Michael Powell and I am the President and Chief Executive Officer of the National Cable & Telecommunications Association. Thank you for inviting me today to offer our thoughts on "Reauthorization of the Satellite Television Extension and Localism Act."

Mr. Chairman, we support the Committee's effort to extend expiring provisions in the Communications Act and to make other reforms that update antiquated video regulations. As the draft bill reflects, a primary concern for Congress is the anticipated expiration of the current Communications Act provision that requires broadcasters and MVPDs to negotiate in good faith when conducting retransmission consent negotiations. By extending the "good faith" requirement for another five years, the Committee draft charts a responsible course and ensures that this bilateral legal obligation remains part of the retransmission consent regime.

In addition to extending the "good faith" requirement, the draft bill also proposes a few additional reform ideas that we believe are appropriate, and in fact, are overdue given the competitive realities of today's video marketplace. Among these provisions, NCTA particularly commends the Committee for its inclusion of two narrow, yet very important, reforms that will prune away outdated legal requirements, directly benefitting consumers and promoting a more level playing field among competing providers of multichannel video services.

One such provision would repeal the FCC's "integration ban" rule, which today forces cable operators – and cable operators alone – to include a separate video decryption component (*e.g.*, a CableCARD) in their leased set-top boxes, adding extra cost, consuming extra energy, and providing no added benefit to cable customers with leased set-top boxes.

Another such provision would prohibit broadcasters that are not commonly owned from insisting on joint negotiations with cable operators and other MVPDs for the price, terms and conditions of their retransmission consent. Through a variety of agreements to share services, such as Joint Sales Agreements ("JSAs") or Shared Services Agreements ("SSAs"), certain broadcasters have been increasing their leverage in the negotiations by banding together and acting as a single entity in the negotiations rather than acting appropriately as competitors. The Department of Justice and the FCC have raised significant concerns about these anticompetitive practices, and it is appropriate for Congress to address this issue as a complement to actions being considered by the FCC.

For these reasons, NCTA is pleased to support the reform approach outlined by the Committee. Its reforms will promote consumer expectations of increased choice and enhance competitive technological neutrality.

Congress Should Extend The Mutual Obligation To Negotiate Retransmission Consent In Good Faith.

NCTA supports the proposed five-year extension of the legal obligation to negotiate retransmission consent in good faith. Broadcast programming remains an important part of the cable service offering, and ensuring that negotiations for the carriage of broadcast programming on cable are conducted honestly, in a good faith attempt to reach a mutually beneficial carriage agreement, is essential. Continuing a duty of good faith works to constrain excessive demands for unreasonable terms and conditions and, when faithfully applied, limits the risk of blackouts or other actions that harm consumers. Accordingly, we support the extension of this requirement for 5 years, which helps to preserve consumer expectations and is consistent with the terms sought in prior efforts to extend expiring provisions.

The FCC’s Integration Ban Imposes Needless Costs On Cable Customers And Is Not Needed To Promote Competition In Retail Video Device Availability.

NCTA commends the inclusion of legislative language, also present in bipartisan legislation (H.R. 3196) introduced by Congressmen Latta (R-OH) and Green (D-TX), that would repeal a technology mandate adopted by the FCC in 1998 that eliminated a low cost choice for consumers, wastes energy, slows innovation, violates principles of competitive neutrality, and is unnecessary to fulfill the stated statutory objective of promoting the competitive availability of retail navigation devices such as set-top boxes.

Congress intended as part of the 1996 Act to create the conditions for a *retail* market for set-top boxes and other navigation devices. The FCC was charged with making it possible for manufacturers to develop and sell devices that could be used, for example, with any cable provider anywhere in the country. Importantly, Congress did not impose any technical requirements on existing set-top boxes *leased* by cable operators to their own subscribers.

In carrying out Congress’s 1996 directive to promote a new market where consumers could choose to buy set-top boxes and other navigation devices at retail rather than lease them from their provider, the FCC did two things. First, it required the cable industry – and only the cable industry – to develop a separate security device, now known as the CableCARD, for use in set-top boxes and other navigation devices that could be sold at retail and used on any cable system. If a customer moved, he could return the CableCARD to his former cable provider, and get a new CableCARD from his new cable provider. This “separate security” requirement fulfilled Congress’s mandate of facilitating the creation of a *retail* market for set-top boxes and other navigation devices.

The FCC, however, took a second and unnecessary step, adopting the so-called “integration ban.” It required cable operators to completely redesign their *own* leased set-top boxes to use CableCARDs, thereby prohibiting the integration of security (encryption) and navigation (channel-changing) functions in set-top boxes. This required operators to strip out security functions that had long been integrated in leased boxes. The idea behind this "integration ban" was that if operators had to rely on CableCARDs in their own boxes, they would have strong incentives to support CableCARDs in retail devices as well. Moreover, by eliminating a low cost leasing option, the FCC was attempting – through a little industrial engineering – to steer consumers to choose new third party options.

With the benefit of hindsight, we can now clearly see that while CableCARDs are a "fully realized solution" (to quote TiVo), the integration ban has not stimulated a consumer appetite for third party devices. Today, more than 45 million CableCARD-enabled set-top devices have been deployed by cable operators to their customers, but a mere 600,000 CableCARDs have been requested by cable customers for use in third-party devices purchased at retail. Very few televisions contain CableCARD slots. This is not for lack of cable industry support of CableCARDs, but because manufacturers have found that consumers are not interested in paying the higher price for TVs with built in set-top technology.

Consumers that freely elect leased boxes, however, are paying a penalty in unnecessary expense and energy costs. By one estimate cited by the FCC, CableCARD technology adds approximately $56 to the cost of an operator's box. We estimate that the costs attributable to the integration ban exceed $1 billion for the cable industry. Additionally, based on EPA figures, cable subscribers also collectively foot the bill for roughly 500 million kilowatt hours consumed by CableCARDs each year. By all measures, the costs of this misguided rule clearly outweigh its benefits.

Further evidence of the integration ban's incoherence is that these financial costs and energy burdens are borne only by cable subscribers and not video customers of satellite providers, like DirecTV and DISH, or of telco providers, like AT&T. Despite these providers being vigorous competitors, they have no CableCARD obligations, creating an un-level playing field. At the time the rule was adopted, cable had a very large market share, and there may have been an arguable case for a rule exclusively applied to cable. Today, however, that share has shrunk from roughly 85 percent to just over 50 percent. DirecTV and DISH are the second and third largest providers of multichannel video programming, and AT&T is the fifth largest MVPD. The integration ban hampers cable's ability to compete fairly in this dynamic marketplace, and there is no substantive justification for this disparate regulatory treatment. Furthermore, the goal of advancing a national market for third party devices is illusory when the ban is applied only to half of the market.

It is important to note that even if the FCC-created integration ban is repealed, cable operators will still be required to provide CableCARDs or other separate security for devices purchased at retail. Third party set-top box makers, like TiVo, will still be able to build boxes that use CableCARDs, and cable operators will be required to support those devices. Beyond a cable operator's continued legal obligation, it will have a strong incentive to continue to support CableCARDs, given that 45 million CableCARD-enabled set-top boxes are in customer homes and that at least seven domestic cable operators are using TiVo as a primary leased set-top box. Repeal of the integration ban simply gives cable customers more choices and lower costs.

Repeal of the integration ban also will not interfere with opportunities for innovation in retail set-top boxes. CableCARD technology is limited to decrypting video programming so that customers can view the channels to which they have subscribed. It does not prevent manufacturers from pursuing new retail products and services now or in the future. The innovative TiVo Roamio DVR is today much more advanced than prior TiVo boxes, yet the CableCARD is the same.

The fact is that the navigation device goals of the 1996 Act are being achieved. As the FCC noted in its recent Video Competition Report, "the CPE marketplace is more dynamic than it has ever been, offering consumers an unprecedented and growing list of choices to access video content." Cable operators have been key actors in facilitating these marketplace developments by making their services available on a broad and growing array of CE devices. Numerous cable operators are delivering cable services to iOS and Android tablets and smartphones, PCs and Macs, and game consoles and other video devices, and that trend is accelerating to meet consumer demand for these options. These devices that consumers want do not rely on CableCARDs. Today's competitive market is obviously providing plenty of incentives for cable operators to make their customers happy without needing cable to adopt the same technology solutions for their own set-top boxes.

Retail competition in navigation devices is a worthy goal, but it is now clear that this goal is best supported by embracing the innovations already occurring in today's retail marketplace and not by clinging to an outdated and costly FCC rule. The repeal of the integration ban will not change the path for innovation in the retail set-top box but will provide more opportunities for innovation in operator-supplied boxes, which will no longer have to be engineered around the CableCARD. We appreciate the inclusion of this important provision in the draft reauthorization bill.

Prohibiting Broadcast Stations From Coordinating Their Retransmission Consent Negotiations Unless Co-Owned Would Create A More Stable Carriage Environment For Consumers.

It is important that any reform seek to promote balance in retransmission consent negotiations. Congress originally created the retransmission consent provisions in an attempt to achieve a competitive balance between the cable and broadcast industries and believed that the retransmission consent negotiation process would provide incentives for both parties to come to mutually beneficial arrangements. Given government's substantial involvement in what would otherwise be a free market negotiation, government has an even greater responsibility to police anticompetitive attempts to gain undue market power.

In recent years, certain broadcaster practices have disrupted that competitive balance. One of the more troubling practices is that broadcasters are using a variety of sharing arrangements, such as JSAs, to coordinate the prices, terms, and conditions they agree to with MVPDs for their retransmission consent.

If multiple broadcast stations in a local market are not co-owned, then they should not be allowed to *act* as if they are co-owned in retransmission consent negotiations through a sharing arrangement. The Department of Justice has voiced concerns about broadcast stations that are not commonly owned jointly coordinating their retransmission consent negotiations. DOJ argues that broadcasters must exercise retransmission consent rights individually, because joint negotiations strengthen the broadcasters' negotiating positions against MVPDs, allowing the stations to obtain better deals, and because joint negotiations eliminate competitive rivalry between the stations. As a result, these joint negotiations result in higher prices and less choice for consumers. FCC Chairman Wheeler recently recognized this point, noting that "joint negotiations have been documented to increase prices to cable systems," which "ultimately are borne by the consumer in the form of higher cable or Direct Broadcast Satellite fees." The Chairman is proposing, justifiably, to eliminate these practices.

NCTA appreciates the inclusion of a provision that would prohibit broadcasters that are not commonly owned from engaging in joint retransmission consent negotiations. While we continue to believe that non-commonly owned broadcasters should not be allowed to coordinate their retransmission consent negotiations in any way – whether through directly or indirectly exchanging or sharing information regarding the terms of existing retransmission consent agreements, the potential terms of future retransmission consent agreements, or the status of on-going retransmission consent negotiations – prohibiting joint negotiations is an important step towards restoring competitive balance in retransmission consent negotiations.

In sum, NCTA is pleased to support the reforms suggested in the draft bill. We appreciate your continued efforts to support a vibrant and innovative video marketplace, and look forward to working further with the Subcommittee on these important issues.

Thank you again for the opportunity to appear today.